Nos. 99-527 & 99-574

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IN THE

Supreme Court of the United States

MATTHEW J. RYAN, ET AL.,

and

THOMAS RIDGE, ET AL.,

Petitioners,

v.

DAVID POWELL, ET AL.,

Respondents.

On Petitions for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF IN OPPOSITION

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All Respondents are individuals, governmental bodies, or membership organizations. None of the incorporated membership organizations has a parent company or nonwholly owned subsidiary company.

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BRIEF IN OPPOSITION

INTRODUCTION

Petitioners, state officials who accept federal funds for public schools, create and knowingly perpetuate a system of public school funding that results in worsening racial disparities, but argue that they are completely insulated from accountability in federal court for their conduct. Their effort to insulate their conduct from review is undeserving of this Court's attention. Petitioners have not presented "compelling reasons," Supreme Court Rule 10, for review by this Court of the carefully reasoned, unanimous opinion of the Third Circuit holding that this case may go forward. The

Third Circuit reversed the dismissal of this case because the District Court "mischaracterized" the allegations of the Complaint and erred in dismissing claims under the United States Department of Education regulation effectuating Title VI of the Civil Rights Act of 1964 and 42 U.S.C. § 1983, but did not presage which side ultimately will prevail. Because Petitioners can cite no Circuit split or conflict with relevant decisions of this Court, and given the very real prospect that this case ultimately will be resolved without the necessity of reaching all, or indeed any, of the questions presented by Petitioners, this Court should decline review now and permit Respondents to develop and present evidence to support their claims.

COUNTERSTATEMENT

A. The Complaint. This Counterstatement is drawn from the Complaint, which must be taken as true on review of a motion to dismiss. *Haddle v. Garrison*, 525 U.S. 121, 119 S. Ct. 489, 491 (1998). Respondents accordingly do not undertake here to correct factual misstatements or to respond to Petitioners' reliance on material outside of the record. *E.g.*, Leg. Pet. 3 n.6. [1]

Respondents are schoolchilden in the Philadelphia Public School District ("the School District") and their parents; organizations that combat racial discrimination in public education and seek sufficient educational support for children in the School District; the School District, its Superintendent and Board of Education; and the Mayor and City of Philadelphia. App. 202a-208a. The School District educates a student body that is nearly 80% African-American, Hispanic, Asian and

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[1] The Petition in No. 99-527, filed by Pennsylvania Legislative Branch officials who intervened as defendants in the District Court, is referenced as "Leg. Pet." "Ex. Pet." refers to the Petition in No. 99-574 filed by Pennsylvania Executive Branch Petitioners. "App." refers to the Appendix to Petition for Writ of Certiorari filed in No. 99-574.

other minority students and that comprises nearly 50% of the minority public school students in Pennsylvania. App. 207a-208a, ¶¶ 23, 24. Minority enrollment in public schools in the rest of Pennsylvania as a whole is only approximately 11%. App. 213a, ¶ 41. The School District's minority composition is known to Pennsylvania officials, who also have knowledge that, more than 25 years ago, state courts and a state agency found the School District was unlawfully segregated by race, with segregated conditions persisting into the 1990s. App. 212a-214a.

Petitioners Ridge, Gallagher, Hickok and Hafer are the Pennsylvania executive branch officials named as defendants in this action. They have responsibility for administering public education in Pennsylvania and accept federal funds for that purpose. App. 208a-212a. A group of legislative branch officials -- Petitioners Ryan, Jubelirer, Stairs and Rhoades -- intervened as defendants to support the Executive Petitioners, although the Executive Petitioners claim that Legislative Petitioners do not receive federal funds "and therefore are not subject to Title VI." Ex. Pet. 8.

Pennsylvania provides funding to school districts for public education through a "statutorily established system" that "depends upon a combination of locally generated revenues authorized by the Commonwealth (that rely primarily upon local property taxes), state funds provided by the Commonwealth [t]reasury ('Commonwealth treasury revenues'), and certain federal funds." App. 215a, ¶ 47. Commonwealth treasury revenues consist of a baseline instructional subsidy to public school districts adopted each year, called Basic Education Funding, *id.*, and categorical subsidies distributed to public school districts according to legislative enactments. The terms by which local funding for each Pennsylvania school district may be generated are controlled by state statute, 24 P.S. §§ 6-601 to 6-695, App. 64a-115a; 53 P.S. § 16101. Federal

education funds are appropriated through state legislative and gubernatorial action. *See Shapp v. Sloan*, 391 A.2d 595 (Pa. 1978), *appeal dismissed sub nom. Thornburgh v. Casey*, 440 U.S. 942 (1979).

Pennsylvania's method of funding public education yields racially different results: Funding per child is less in the predominantly minority School District than it is per child in otherwise similarly situated districts that educate predominantly white students. App. 217a-218a, ¶¶ 53, 55. This racial disparity per child exists not just in Philadelphia, but also in other predominantly minority districts in Pennsylvania, *e.g.*, App. 218a, ¶ 55, and has grown over time with respect to both Commonwealth treasury revenues and total revenue. App. 217a-218a, ¶¶ 53, 56.

For example, in 1995-96, for two school districts with the same level of poverty (as measured by Aid to Families with Dependent Children), the school district with higher minority enrollment received $52.88 less Commonwealth treasury revenues per pupil for each increase of 1% in minority enrollment. App. 218a, ¶ 55. In 1990-91, the School District "received 17.2% less [per child in Commonwealth treasury revenues] than the average of school districts with the same poverty rate." App. 217a-218a, ¶ 53. By 1995-96, this disparity had risen to 33.1% per child. *Id.*

Between 1992 and 1996, total revenues to school districts with 50% or more white students increased by a weighted average of $776 per pupil, while the increase to the School District was only $84 per pupil and the increase to districts with more than 75% minority enrollment was only $149 per pupil. App. 218a, ¶ 56.

These intensifying levels of racial discrimination in funding, and the consequent harm to Respondents, arise not from some inadvertent statistical anomaly, but from Petitioners' funding decisions made, over time, with prior knowledge of those racially discriminatory conse-

quences. App. 215a, ¶ 47; 219a, ¶¶ 59, 60; 223a, ¶ 73; 225a, ¶ 80.

Because the Executive Petitioners receive federal funds, § 601 of Title VI of the Civil Rights Act of 1964 prohibits them from subjecting any person to racial discrimination in public education in Pennsylvania. 42 U.S.C. § 2000d (App. 57a). The United States Department of Education regulation adopted to "effectuate the provisions of section" 601, 42 U.S.C. § 2000d-1 (App. 57a), prohibits providing different services on the basis of race, subjecting an individual to segregation, or utilizing "criteria or methods of administration which have the effect of subjecting individuals to discrimination because of their race," or which defeat or "substantially impair[] accomplishment of the objectives of the program" for individuals of a particular race. 34 C.F.R. § 100.3(b)(1)(ii),(iii), (2) (App. 59a-60a).

Count I of the Complaint claims that these funding policies and practices violate the Department of Education Title VI regulation in four respects. First, they create a racially discriminatory effect in violation of 34 C.F.R. § 100.3(b)(2):

> The Commonwealth['s] funding policies and practices wrongfully discriminate against African-American, Hispanic, Asian and other minority students in the School District by utilizing criteria and methods that have had the foreseeable effect of subjecting such students to discrimination because of their race, color, or national origin, by disproportionately denying them necessary support for their education, in violation of the Title VI implementing regulations applicable to federal education programs.

App. 223a, ¶73.

Second, the state-established funding system violates the regulatory prohibition against providing "any service, financial aid, or other benefit to an individual which is different, or is provided in a different manner, from

that provided to others under the program" on the basis of race, since it does not provide "educational opportunity equal to that which children who live in predominantly white school districts receive." App. 222a-223a, ¶¶ 70 (*quoting* 34 C.F.R. § 100.3(b)(1)), 73. Third, the funding system violates the regulatory prohibition on subjecting "an individual to segregation or separate treatment in any matter related to his receipt of any service, financial aid, or other benefit under the program," App. 222a, ¶ 70 (*quoting* 34 C.F.R. § 100.3(b)(1)), because Petitioners' "funding policy and practices have the foreseeable, racially discriminatory effect of further isolating the Student Plaintiffs, the School District, and the City by race in the Philadelphia metropolitan area, and of impairing the School District Plaintiffs' ability to provide a thorough and efficient educational system which is racially non-discriminatory and racially non-segregated." App. 223a, ¶ 75. Finally, the objectives of specific federal education programs for which Pennsylvania receives federal funds, "are defeated or substantially impaired in Philadelphia by the Commonwealth['s] challenged racially discriminatory funding policies and practices," in violation of 34 C.F.R. § 100.3(b)(2). App. 222a, ¶ 70; App. 224a, ¶ 77.

In Count II of the Complaint, the student and organization plaintiffs assert a second claim, which goes almost unmentioned by Petitioners. The claim arises under the Civil Rights Act of 1871, 42 U.S.C. § 1983, which provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Because the rights secured by Title VI and the Department of Education regulations are rights, privileges, and immunities secured by the laws of the United States, Pennsylvania officials responsible for the funding of public schools in a manner that violates their obligations under the Title VI regulation are liable in a suit in equity for injunctive relief under § 1983.

The Prayer for Relief requests only declaratory and prospective injunctive relief, prohibiting Petitioners, if they wish to accept future federal funds, "from continuing to implement a system of funding public schools that discriminates against . . . minority children enrolled in" the School District "and that thereby harms" all Respondents. App. 226a-227a.

B. The District Court Decision. The District Court dismissed both Counts of the Complaint with prejudice pursuant to Rule 12 of the Federal Rules of Civil Procedure, on the motions of both groups of Petitioners. App. 32a-56a. On Count I, the District Court concluded that Respondents failed to state a claim for "disparate impact" under the Title VI regulation, because the District Court characterized the Complaint as alleging discrimination based on poverty rather than race and found no allegation "that the School District receives any less Commonwealth funding than other school districts." App. 52a-53a. The District Court further ruled that the School District and City plaintiffs lack "standing" because they are not "persons" protected by Title VI. App. 42a-44a.

The Court next dismissed Count II solely on the ground that the Executive Petitioners named as defendants are not "persons" covered by § 1983, even though the case is one seeking prospective injunctive relief. App. 39a-42a.

The District Court rejected numerous other arguments offered by Petitioners here. In particular, the Court declined to invalidate the Department of Education's

Title VI regulation or to deny a private right of action for prospective injunctive relief to enforce the regulation in federal court. App. 46a-48a. The Court did not address the Legislative Petitioners' contention, raised again before this Court, that the injury alleged in the Complaint is not "redressable" because entities other than Pennsylvania play a role in funding decisions for the public schools. *See* Leg. Pet. i, Question Presented 3. No motion before the District Court raised the third issue presented here by the Executive Petitioners, whether a "generally worded regulation" can support a challenge to discriminatory school funding. Ex. Pet. i, Question Presented 3.

C. The Third Circuit's Ruling. The Third Circuit reversed the District Court's dismissal of both Counts of the Complaint. App. 1a-31a. The unanimous Third Circuit panel concluded that the District Court had "mischaracterized" the Complaint as being "based on economic circumstances rather than race." App. 13a. The Third Circuit held that the Complaint was sufficient to put Petitioners on notice "that less educational funding is provided by the Commonwealth to school districts attended by most non-white students in Pennsylvania than to school districts attended by most white students . . . [and] that the funding disparities injure non-white students by limiting their educational opportunities." *Id.*

Without opining on the merits, the Court concluded that "the plaintiffs should be given the opportunity to offer evidence in support of their claims." *Id.* In so doing, the Court of Appeals recognized the factual complexity of the funding system and the need for factual development in this case:

> We note that there are many components to the Commonwealth's formula, which the plaintiffs allege was changed each year between 1991-92 and 1996-97. Indeed, even after requesting and receiving supplemental briefs from the parties concerning that

> formula, we remain unable to discern with precision the basis on which the Commonwealth funds the school districts. It may be that some of the necessary information will be forthcoming from the defendants' files and employees during discovery.

App. 16a. In an observation ignored here by Petitioners, the Third Circuit also recognized that dismissal was not appropriate because Respondents' allegations of Petitioners' prior knowledge of the racially discriminatory consequences of their actions justified further factual development as to Petitioners' intent. App. 9a-10a n.1.

The Court of Appeals then rejected, as the District Court had before, Petitioners' argument that there is no private right of action to seek prospective injunctive relief to enforce the Title VI regulations. App. 16a-22a. The Court analyzed the issue under well-established Third Circuit precedent that incorporates the test prescribed by this Court in *Cort v. Ash,* 422 U.S. 66 (1975), to determine when a private right of action may be implied under a federal statute. *See Angelastro v. Prudential-Bache Secs., Inc.,* 764 F.2d 939 (3d Cir.), *cert. denied*, 474 U.S. 935 (1985). The Court found the requirements of the *Cort* and *Angelastro* tests satisfied, and noted that its decision was "in keeping with the decisions of the other courts of appeals that have addressed this issue," App. 20a, since the Eleventh Circuit has held that a private right of action exists under regulations enforcing Title VI, *Burton v. City of Belle Glade,* 178 F.3d 1175 (11th Cir. 1999), and other Courts of Appeals have reached the merits of such claims. App. 18a-21a.

The Third Circuit rejected the argument, repeated here, Ex. Pet. 8-14 and Leg. Pet. 6-10, that the Title VI regulations are barred under *Ernst & Ernst v. Hochfelder,* 425 U.S. 185 (1976), because they "create federal law." App. 21a. The Court of Appeals cited this Court's pronouncements on the Title VI regulations and numerous other federal cases that have implied private rights

of action to enforce regulations "under similar circumstances," including under Title IX. App. 21a-22a. The court explained:

> In each of these cases, the analysis as to whether there was a private right of action to enforce the regulation at issue would not have been necessary if the regulation did not go further than that statute; the private right of action under the particular statute alone would have sufficed.

App. 22a.

The Third Circuit also rejected the District Court's notion that state officials acting in their official capacities are not "persons" within the meaning of § 1983, a proposition that no party defended on appeal. App. 22a-23a. [2]

Finally, the Court rejected the Legislative Petitioners' argument that Respondents, including the parents of children who attend the School District, lack standing because the injury of which they complain is not redressable by the injunction they seek:

> The legislative defendants err in assuming that the injury in this case consists of a lack of adequate funding. Here, the plaintiffs complain that non-white school children in Pennsylvania receive less favorable treatment than their white counterparts because the state funds the school districts most of them attend at a lower level than it does the school districts most white school children attend. A court order directing the state to equalize funding between these

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[2] The Third Circuit also addressed and rejected Petitioners' argument for affirming the dismissal of the § 1983 claim. App. 24a-27a. Petitioners had advanced in the Third Circuit a different ground for affirming the dismissal of the § 1983 claim based on *Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n*, 453 U.S. 1 (1981). Petitioners have not renewed that issue here.

> school districts would redress this comparative injury, even if other sources of the school district's income were simultaneously reduced. We therefore conclude that the school children's injury is redressable by court order.

App. 28a (footnote omitted).

Petitioners sought neither rehearing by the panel nor rehearing *en banc*. They did not seek to stay the Third Circuit mandate, so the case is proceeding in the District Court.

REASONS FOR DENYING THE WRIT

Each Petition presents three questions. The first two questions in each Petition are the same: First, whether the regulation adopted under Title VI prohibiting discriminatory effects in programs receiving federal funds is authorized by Title VI; second, whether there is a private right of action for prospective injunctive relief to enforce the regulation. Each Petition raises a distinct third question. (Each group of Petitioners apparently could not even convince the other that there are "compelling reasons" for the Court to consider these issues.) The two Petitions accordingly present a total of four questions, considered seriatim below.

None of the four questions is appropriate for the Court's consideration. The Third Circuit's decision reverses dismissal of the Complaint under Rule 12 of the Federal Rules of Civil Procedure, and thus holds only that Respondents may proceed to discovery and proof of their claims. Except in extraordinary cases, this Court does not grant certiorari on a petition that seeks intervention before final judgment in the lower courts. *See Texas v. Hopwood,* 518 U.S. 1033 (1996) (opinion of Ginsburg, J., respecting the denial of the petition for certiorari); *Virginia Military Inst. v. United States*, 508 U.S. 946 (1993) (opinion of Scalia, J., respecting the denial of the petition for certiorari); *Brotherhood of*

Locomotive Firemen v. Bangor & Aroostok R.R, 389 U.S. 327, 328 (1967) (per curiam) ("because the Court of Appeals remanded the case, it is not ripe for review"); *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 257-259 (1916) (certiorari jurisdiction should be "exercised sparingly" and "except in extraordinary cases, the writ is not issued until final decree"); *American Constr. Co. v. Jacksonville, T. & K.W. Ry.*, 148 U.S. 372, 384 (1893) ("this court should not issue a writ of *certiorari* to review a decree of the Circuit Court of Appeals on appeal from an interlocutory order, unless it is necessary to prevent extraordinary inconvenience and embarrassment in the conduct of the cause").

The wisdom of this Court's practice is well illustrated by this case, since the questions presented may never have to be reached by this Court. If Respondents prevail below on their § 1983 claim (Count II), resolution of the private right of action question would become unnecessary. If Respondents prevail under a provision of the Title VI regulation other than the provision challenged in the first question presented in the Petitions, that question would not have to be reached in this case. Moreover, the Third Circuit recognized that factual development of Respondents' allegations could result in a finding of intentional discrimination. App. 9a n.1, citing *Davis v. Monroe County Bd. of Educ.*, 119 S. Ct. 1661 (1999). Such a finding would avoid the need to resolve either of the two main issues, or any of the other questions presented.

Nor are there any extraordinary circumstances that justify an exception to the usual rule here. Petitioners seek rulings unsupported by any Court of Appeals and contrary to this Court's precedents. A denial of certiorari will not preclude Petitioners from renewing the questions presented if those issues remain in the case after final judgment. *See Virginia Military Inst.*, 508 U.S. 946 (opinion of Scalia, J., respecting the denial of the petition for certiorari) (denial of a petition before

final judgment "does not preclude [petitioner] from raising the same issues in a later petition, after final judgment has been rendered"); *Hughes Tool Co. v. Trans World Airlines, Inc.*, 409 U.S. 363, 365-366 n.1 (1973); *Hamilton-Brown Shoe Co.*, 240 U.S. at 257-259.

I. THE COURT SHOULD NOT TAKE THIS CASE TO REVIEW THE VALIDITY OF THE TITLE VI REGULATION PROHIBITING DISCRIMINATORY EFFECTS BECAUSE THE COMPLAINT ALLEGES FAR MORE THAN SUCH EFFECTS, THOSE FACTS SHOULD BE DEVELOPED THROUGH DISCOVERY AND PROOF, AND NO DISPUTE IN THE COURTS OF APPEALS CALLS FOR THIS COURT'S RESOLUTION.

1. The linchpin of Petitioners' attack on the Department of Education Title VI regulation is that a Complaint challenging a school funding system should not be permitted to proceed under a federal regulation prohibiting "disparate impact on a racial or ethnic basis, even if the impact is inadvertent." Leg. Pet. 3. *Accord,* Ex. Pet. 3. The Third Circuit found, however, that Respondents' allegations go far beyond inadvertent consequences (App. 13a-15a); the regulations themselves bar not just discriminatory effects, but also conduct that subjects children to racial segregation or substantially impairs the objectives of federally funded programs for children on the basis of race.

By repeating again and again that this case involves "unintentional disparate impacts on racial or ethnic groups," Leg. Pet. 7; Ex. Pet. 10, Petitioners isolate a single, incomplete aspect of the conduct actually alleged in the Complaint. Petitioners' funding policies have the foreseeable -- and foreseen -- consequence of discriminatorily funding public education and undermining educational opportunities on the basis of race. App. 215a, ¶ 47; 219a, ¶¶ 59, 60; 223a, ¶ 73; 225a, ¶ 80. The system for funding public education in Pennsylvania has

exacerbated segregation of African-American and other minority students in the Philadelphia area, App. 223a-224a, ¶¶ 73, 75, and has impaired the objectives of the federal programs that fund education in Philadelphia. App. 224a, ¶ 77. Count I alleges that Petitioners' conduct violates the Department of Education's Title VI regulation even apart from the provision quoted by Petitioners dealing with racially disparate "effect." App. 222a-225a. *See* 34 C.F.R. § 100.3(b)(1)(ii),(iii), (2); App. 59a-60a (barring federal fund recipients from, on the basis of race, color, or national origin, "[s]ubjectin[g] an individual to segregation or separate treatment," or utilizing criteria or methods of administration that "have the effect of defeating or substantially impairing accomplishment of the objectives of the program as respects individuals of a particular race, color, or national origin").

2. As the Third Circuit recognized, App. 9a n.1, further proceedings will focus on applying the various provisions of the regulation to the facts as developed through discovery and proof. The Executive Petitioners attach more than 130 pages of Pennsylvania Statutes to their Petition, App. 64a-197a, and discuss the statutory scheme at length, Ex. Pet. 4-6, suggesting that the case cannot be resolved in their favor until the meaning and significance of these statutes is addressed. The present record, which consists of nothing more than the allegations of the Complaint, is a poor vehicle for testing the scope and validity of one provision of the regulation as applied to such complex facts.

3. Petitioners' portrayal oversimplifies to the point of distortion not just the facts and violations alleged in the Complaint, but the Title VI enforcement mechanism. Both Petitions argue that the Court should take this case to strike down the Department of Education's regulation enforcing Title VI because the regulation "prohibit[s] unintentional disparate impacts on racial or ethnic groups," while "Title VI of the Civil Rights Act of

1964 . . . prohibits only *intentional* racial or ethnic discrimination by recipients of federal funding." Leg. Pet. 7,6. *Accord*, Ex. Pet. 10. Petitioners misunderstand the combined statutory and regulatory design of Title VI. The Title VI regulations were required by a Congress that knew before enactment what such regulations would proscribe. The key compromise that emerged from one of the final markups of the bill that became the Civil Rights Act of 1964 was a mandate that federal agencies promulgate their own regulations for carrying out the general antidiscrimination clause in Title VI, rather than having Congress address through Title VI itself all the intricacies of what conduct would be prohibited. [3]

Secretary Celebrezze, of the Department of Health, Education and Welfare, which was responsible for drafting the original regulations, made clear to Congress that HEW, once given that authority, would take the position that "racial imbalance" -- language which at the time connoted "disparate impact" -- could prompt cutoff of federal funds by HEW. *See Civil Rights: Hearings Before Subcomm. No. 5 of House Comm. on Judiciary*, 88th Cong., 1st Sess. 1519 (1963) ("House Subcomm. Hearings") (testimony of Secretary Celebrezze). Congress developed and passed § 602 of the Act, 42 U.S.C. § 2000d-1, which directs each federal department and agency "to effectuate the provisions of section 2000d [§ 601] of this title . . . by issuing rules, regulations, or orders of general applicability which shall be consistent with the achievement of the objectives of the statute authorizing the financial assistance. . . ." App. 57a. Such regulations are not effective until approved by the President. *Id.* Congress

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[3] *See Civil Rights: Hearings on H.R. 7152 Before the House Comm. on the Judiciary*, 88th Cong., 1st Sess. 2652, 2740, 2765-66 (1963) (Attorney General Kennedy); Charles F. Abernathy, *Title VI and the Constitution: A Regulatory Model for Defining "Discrimination,"* 70 Geo. L. J. 1, 3, 22 (1981).

thus well knew when it passed Title VI that the regulations would address discriminatory "effects," and not only purposeful racial animus.

The regulations developed by HEW as required by § 602 prohibited discriminatory impacts in federally funded programs and were put in place in 1964, the same year Congress passed Title VI. *See* 45 C.F.R. § 80.3 (1964). Comparable regulations have been adopted by over 40 cabinet departments and federal agencies. App. 9a. Seven Presidents -- President Johnson and each of his successors -- have approved such regulations.

Petitioners concede that the validity of the Title VI regulations is a question solely of statutory authority, not constitutional law. Ex. Pet. 1. Everything about Congressional conduct since the regulations were adopted throughout the federal government supports the conclusion that Congress has acquiesced in them. Congress has amended Title VI six times since 1964 without disapproving the regulations. [4] Congress also has passed statutes modeled on Title VI, including a directive for agency regulation to enforce a general ban on discrimination [5] and, in a 1978 statute, a requirement of rules "similar to those established and in effect under [T]itle VI . . . of the Civil Rights Act of 1964." [6] It is fanciful to think that Congress would have built so solidly on the

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[4] *See* Pub.L. 89-750, Title I, § 182, Nov. 3, 1966, 80 Stat. 1209; Pub.L. 90-247, Title I, § 112, Jan. 2, 1968, 81 Stat. 787; Pub.L. 91-230, § 2, Apr. 13, 1970, 84 Stat. 121; Pub.L. 96-88, Title III, § 301(a)(1), Title V, § 507, Oct. 17, 1979, 93 Stat. 677, 692; Pub.L. 99-506, Title X, § 1003, Oct. 21, 1986, 100 Stat. 1845; Pub.L. 100-259, § 6, Mar. 22, 1988, 102 Stat. 31.

[5] *See* Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681-82; Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794.

[6] The Outer Continental Shelf Lands Act Amendments of 1978, 43 U.S.C. § 1863.

Title VI foundation if it had not intended the scope of the resulting regulations.

4. This Court also has recognized that the overall Title VI enforcement scheme attacks conduct on the full spectrum from purposeful discrimination motivated by racial animus to discriminatory effects, and in so doing has recognized the validity of the Title VI regulations. In *Guardians Association v. Civil Service Commission,* 463 U.S. 582 (1983), the Court considered a claim that an entry-level employment test had a disparate impact that disadvantaged Hispanic and African-American candidates for the New York City Police Department, in violation of Title VI. The police department received federal funds and thereby bound itself to abide by Title VI and its regulations. *See* 463 U.S. at 642 (Stevens, J., dissenting). At trial, plaintiffs failed to show intentional discrimination, but established "disproportionate impact of the entry-level test on racial minorities." 463 U.S. at 598 (opinion of White, J.). The Court ruled that compensatory relief is available in private Title VI lawsuits in federal court only where discriminatory intent is shown, 463 U.S. at 584 (opinion of White, J.), and recognized the validity of Title VI regulations that, as a condition of federal funding, proscribe conduct with a racially disparate impact. Justice White took care at the end of his opinion announcing the judgment of the Court to identify the following as one of the two propositions adopted by a majority of the Justices:

> [Five Justices] form a majority for upholding the validity of the regulations incorporating a disparate-impact standard.

436 U.S. at 607 n.27. Just two years later, in a unanimous opinion, this Court explained that its earlier decision in *Guardians* "*held* that actions having an unjustifiable disparate impact on minorities could be redressed through agency regulations designed to implement the purposes of Title VI." *Alexander v. Choate,* 469 U.S. 287, 293 (1985) (emphasis added). *Alexander*

and *Guardians* both were decided before the two most recent amendments to Title VI. *See* note 4, *supra*. Congress did not disturb the conclusion that the regulations are valid.

5. Not a single case has declared Title VI regulations invalid, so Petitioners can point to no Circuit split on the issue. Moreover, the validity of the Department of Education regulation is supported by this Court's standard analysis of the scope of regulatory authority. The regulations are reasonably designed to meet the objectives of the enabling statute. *See United States v. O'Hagan*, 521 U.S. 642, 672-673 (1997); *Mourning v. Family Publications Serv., Inc.*, 411 U.S. 356, 369 (1973). The purpose of the enabling legislation is clear: Congress' core concern in adopting Title VI was to eliminate racial discrimination in programs that receive federal funds, in order to avoid federal subsidization of such conduct and to give its victims meaningful protection. *See Cannon v. University of Chicago*, 441 U.S. 677, 704 (1979). Issues of racial segregation and inequitable educational opportunity were among the most pressing problems of racial injustice that Congress intended to attack in the Civil Rights Act of 1964. House Subcomm. Hearings at 928-930 (message from the President of the United States).

It is undisputed here that Congress has the power under the Spending Clause to condition future grants of federal money on a recipient's refraining from certain conduct, even though such conduct may otherwise be neither illegal nor unconstitutional. *See Rust v. Sullivan*, 500 U.S. 173, 195 n.4 (1991) (regulations prohibiting Title X projects from engaging in abortion counseling are constitutional); *South Dakota v. Dole*, 483 U.S. 203, 206 (1987) ("Congress may attach conditions on the receipt of federal funds, and has repeatedly employed the power to further broad policy objectives by conditioning receipt of federal moneys upon compliance by the recipient with federal statutory *and administrative*

directives") (internal citation omitted) (emphasis added). Where a regulation effectuating such a valid congressional purpose goes beyond the literal language of the statute, it is valid as well if it is a "prophylactic measure" designed to meet the specific objectives of the statute. *O'Hagan*, 521 U.S. at 673 (SEC regulations may prohibit non-fraudulent acts if regulations are reasonably designed to prevent fraudulent acts and practices). *See also City of New York v. FCC*, 486 U.S. 57, 64 (1988) (affirming FCC preemption of state law as valid when done to avoid frustration of statute's purpose); *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 382 (1969) (sustaining validity of FCC regulations that go beyond statutory mandates where statutory objectives could be circumvented but for the regulations). In analyzing whether regulations are reasonably designed to meet statutory objectives, this Court "must accord the [agency's] assessment 'controlling weight unless [it is] arbitrary, capricious, or manifestly contrary to the statute.'" *O'Hagan*, 521 U.S. at 673 (*quoting Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984)).

The Court will not disturb a regulatory provision "unless it appears from the statute or legislative history that the accommodation is not one that Congress would have sanctioned." *City of New York*, 486 U.S. at 64 (quotation omitted).[7] Thus, in addition to the reasons dis-

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[7] *Ernst & Ernst v. Hochfelder*, 425 U.S. 185 (1976), relied on by Petitioners for its holding that a particular rule promulgated by the Securities and Exchange Commission exceeded the authority of the Securities Exchange Act of 1934, is inapposite because this Court's holding was based in part on its conclusion that the rule was incompatible with the agency's own administrative history and specific language in the legislation. *Id.* at 212-213 & n.32. In this case, however, federal agencies that adopted the HEW regulations, including the Department of Education here, never have wavered from their position that their regulations prohibit practices that have a discriminatory impact. By not defining the term "discrimination" in § 601 of Title VI, and by requiring regulations to "effectuate" that provision in § 602,

cussed above concerning the interlocutory nature of this case as it comes to the Court, this Court should not review the first question presented in both Petitions because Congress knew there would be regulations reaching racially disparate impact when it directed in § 602 that agencies adopt regulations, and such regulations serve the goal of the statute to stop federal financial support for discrimination. [8]

II. THE ISSUE OF WHETHER A PRIVATE ACTION MAY BE BROUGHT SEEKING A PROSPECTIVE INJUNCTION TO ENFORCE TITLE VI REGULATIONS IS NOT WELL-SUITED FOR RESOLUTION IN THIS CASE.

The Petitioners' argument that this Court should take this case to decide the question whether there is a private right of action to enforce Title VI regulations is grounded in the fact that the Court granted certiorari to review that issue in *Seif v. Chester Residents Concerned for Quality Living*, 118 S. Ct. 2296, *writ dismissed as moot*, 119 S. Ct. 22 (1998). This case, however, is not *Chester Residents*.

Chester Residents involved a complaint which relied solely on a private right of action based on the Title VI regulations. [9] Here, however, Count II is based in 42

Congress intended that the agencies have room to develop a definition. *See United States v. Haggar Apparel Co.*, 526 U.S. 380, 119 S. Ct. 1392, 1399 (1999).

[8] Justice Stewart applied this reasoning in his concurring opinion in *Lau v. Nichols*, 414 U.S. 563, 569-571 (1974), to consider "[t]he critical question . . . whether the regulations and guidelines promulgated by HEW go beyond the authority of § 601 [of Title VI]." *Id.* at 571 (Stewart, J., concurring). The Title VI regulations were valid, Justice Stewart concluded, because they were "'reasonably related to the purposes of the enabling legislation.'" *Id.* (*quoting Thorpe v. Housing Auth. of City of Durham*, 393 U.S. 268, 280-281 (1969)).

[9] The complaint in *Chester Residents* is reproduced in the Joint Appendix filed in this Court's Docket Number 97-1620.

U.S.C. § 1983. App. 225a. This case will go forward and could be decided in any event on Count II, regardless of whether there is a private right of action to bring Count I.

Moreover, the *Chester Residents* plaintiffs did not specifically allege violations of the further provisions of the Environmental Protection Agency regulations that prohibit federal fund recipients from providing differential service on the basis of race, subjecting individuals to racial segregation, and impairing the objectives of a federally funded program for participants on the basis of race. 40 C.F.R. § 7.35. The comparable provisions in the Department of Education regulation all have been pleaded here. App. 222a-224a.

This case, unlike *Chester Residents*, is not limited to the issue of whether a plaintiff should be permitted to pursue a claim under Title VI regulations simply by alleging a discriminatory effect. Rather, this case further involves allegations that Petitioners acted with full knowledge of a racially disparate impact. App. 215a, ¶ 47; 219a, ¶¶ 59, 60; 223a, ¶ 73; 225a, ¶ 80. When this case reaches judgment, it thus may not even raise the more narrow question of the availability of a private right of action to challenge pure discriminatory effects.

This Court's jurisprudence, moreover, has developed since *Chester Residents* in a way that supports the Third Circuit's conclusion that a private right of action exists. Specifically, the Court recently endorsed the analytic framework used by Justice White in *Guardians*. In *Gebser v. Lago Vista Independent School District*, 524 U.S. 274, 118 S. Ct. 1989 (1998), the Court held that a private right of action for money damages against a school district will not lie under Title IX of the Education Amendments of 1972, by reason of a teacher's sexual harassment of a student, in the absence of actual knowledge of the conduct on the part of the school district. In describing the contours of private rights of

action to enforce Title IX, the Court, citing to Justice White's opinion in *Guardians,* relied on the contractual framework by which federal fund recipients under Title IX, as under Title VI, [10] accept "an offer of federal funding on a promise by the recipient not to discriminate, in what amounts essentially to a contract between the Government and the recipient of funds." 118 S. Ct. at 1997. Under that analysis, knowledge of the harassment by the officials of the entity receiving federal funds is a critical consideration in whether damages are available for an alleged Title IX violation. 118 S. Ct. at 1998.

The Court in *Gebser* recognized, however, that these concerns are absent in cases seeking prospective injunctive relief: "Justice White's opinion announcing the Court's judgment in *Guardians* . . . concluded that the relief in an action [under Title VI] alleging unintentional discrimination should be prospective only, because where discrimination is unintentional, 'it is surely not obvious that the grantee was aware that it was administering the programs in violation of the [condition].' 463 U.S. at 598." *Gebser*, 118 S. Ct. at 1998.

Petitioners never mention *Gebser*, or acknowledge the importance of this principle. Respondents seek only prospective injunctive relief, to require future compliance with the regulation. The Legislative Petitioners thus confuse when they warn that Title VI's abrogation of Eleventh Amendment sovereign immunity is somehow implicated here. Leg. Pet. 22-23. No such issue ever will be presented in this case, because no damages are sought.[11] Under *Gebser*, the analysis of private

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[10] "[Title IX] was modeled after Title VI of the Civil Rights Act of 1964, . . . which is parallel to Title IX except that it prohibits race discrimination, not sex discrimination, and applies in all programs receiving federal funds, not only in education programs." *Gebser*, 118 S. Ct. at 1997 (citations omitted).

[11] The District Court held that the Eleventh Amendment is no bar to this case because the Complaint seeks only prospective

rights of action is aligned with the remedy sought. A suit for a prospective injunction to enforce federal regulations is far less intrusive than a damages case; this Complaint simply asks that a federal fund recipient be required to do in the future what it already has agreed to do. Leaving the Third Circuit's decision to stand while this case proceeds thus does not risk a flood of damages cases or threaten the role of the states in the federal system, who have been on clear notice of this requirement since 1964. *Cf.* Leg. Pet. 22.

Petitioners urge that such determinations are in the first instance for an expert federal agency, Leg. Pet. 13, Ex. Pet. 16, but they fail to recognize that administrative proceedings need not be exhausted before a suit may be brought under Title VI or Title IX. *See Cannon*, 441 U.S. at 706-708 nn.41 & 42. One of the key reasons the Court reached that conclusion in *Cannon* was that the United States candidly admitted that it could not enforce Title IX alone. *Id.* at n.42. The same is true here. The United States has urged in this case that private suits such as this one "are critical to ensuring optimal enforcement of the mandate of Title VI and the regulations." Brief of the United States as Amicus Curiae (filed February 17, 1999, 3d Cir. Nos. 98-2096, 98-2157) at 1.

Every Court of Appeals that has considered the question has permitted litigants to proceed under Title VI regulations. Petitioners are wrong when they assert that "this case is now the only circuit case to explicitly hold that private plaintiffs may enforce Section 602 disparate-impact regulations." Leg. Pet. 13 n.13. *See also* Ex. Pet. 16. As the Third Circuit observed:

> The Eleventh Circuit has explicitly "recognized an implied private right of action to enforce the regula-

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injunctive relief, which is permitted against state officials under *Ex parte Young*, 209 U.S. 123 (1908). App. 48a-51a. Petitioners did not raise that issue on appeal.

> tions promulgated under section 602 of Title VI," thereby permitting private plaintiffs to "obtain injunctive or declaratory relief by showing, *inter alia*, that the challenged action has a 'disparate impact on groups protected by the statute, even if those actions are not intentionally discriminatory.'" *Burton v. City of Belle Glade*, [178 F.3d 1175 (11th Cir. 1999)] (*quoting Elston v. Talladega County Bd. of Educ.*, 997 F.2d 1394, 1406 (11th Cir. 1993)); *see also Georgia State Conference* [*of Branches of NAACP v. Georgia*, 775 F.2d 1403, 1417 (11th Cir. 1985)].

App. 20a.

The Third Circuit also cited cases from four other circuits that "reached the merits of disparate impact claims brought by individual plaintiffs under the Title VI regulations," App. 20a, although without explicitly conducting a private right of action analysis. *See Villanueva v. Carere*, 85 F.3d 481, 486-487 (10th Cir. 1996); *City of Chicago v. Lindley*, 66 F.3d 819, 827-830 (7th Cir. 1995); *Larry P. by Lucille P. v. Riles*, 793 F.2d 969 (9th Cir. 1984); *New York Urban League, Inc. v. New York*, 71 F.3d 1031 (2d Cir. 1995). *Accord, Ferguson v. City of Charleston, South Carolina*, 186 F.3d 469, 480 & n.10 (4th Cir. 1999) (reviewing on the merits a "Title VI disparate impact claim").[12] Private actions have been permitted to proceed not only under Title VI regulations but under other federal regulations as well. App. 21a-22a, citing *Lowrey v. Texas A&M Univ. Sys.*, 117 F.3d 242 (5th Cir. 1997) (Department of Education regulations under Title IX); *Robertson v. Dean Writter Rey-*

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[12] The Legislative Petitioners are incorrect that they are somehow deprived of the opportunity to present affirmative defenses in such an action. Leg. Pet. 23 n.18. Courts considering these cases routinely allow a defendant to respond to a prima facie case of racially disparate impact with a showing of "substantial legitimate justification." *Elston*, 997 F.2d at 1412. *Accord, Ferguson*, 186 F.3d at 480; *New York Urban League*, 71 F.3d at 1036.

nolds, Inc., 749 F.2d 530 (9th Cir. 1984) (Securities and Exchange Commission Rule 10b-16).

There simply is no split in the Circuits on the availability of prospective injunctive relief in federal court to enforce the Title VI regulations. No Court of Appeals has agreed with Petitioners' position, nor did either court below. The Legislative Petitioners also are incorrect in arguing that because Courts of Appeals describe in different terms the test used to determine whether a private right of action exists to enforce a federal regulation, a Circuit split exists that should be resolved by this Court. Leg. Pet. 14-17. That several Circuits have used differently worded analyses to reach the same conclusion does not constitute a Circuit split. Robert L. Stern, *et al.*, *Supreme Court Practice* 167 (7th ed. 1993) ("there must be a real or 'intolerable' conflict on the same matter of law or fact, not merely an inconsistency in dicta or in the general principles utilized").

Because, unlike *Chester Residents*, this case does not present the private right of action question as a stand-alone, dispositive issue, and because the Third Circuit was correct in any event (particularly considering the subsequent teaching of *Gebser*), certiorari should not be granted to review question two in the Petitions.

III. THE EXECUTIVE PETITIONERS' "GENERALLY WORDED REGULATION" QUESTION IS NOT WORTHY OF CERTIORARI.

In an argument not made to the District Court, Executive Petitioners suggest that subjecting their school funding scheme to scrutiny under a long-established federal regulation that bans racial discrimination raises "serious federalism concerns." Ex. Pet. 27. Petitioners seem to believe that Congress was not explicit enough in expressing its intent that the Department of Education should adopt a regulation ensuring that those who accept federal funds for their public school programs do not

administer those programs in a manner which discriminates against persons on the basis of race. Because of the alleged "generality" of the blanket prohibition on discrimination in both Title VI and the implementing regulation, Petitioners would have the Court insulate Petitioners' actions from challenge by both private parties and government agencies.

No principle of federalism justifies exempting public school education from the reach of the federal civil rights laws based on race. Petitioners' argument is built upon a misapplication of *Alexander* and *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973), neither of which involved racial discrimination. [13] The single footnote sentence in *Alexander*, which refers to "generally worded regulations" and is the basis of Petitioners' argument, states that in the absence of explicit statutory language to the contrary, this Court would not read into § 504 of the Rehabilitation Act of 1973 the requirement that states conduct a "Handicapped Impact Statement" similar to the "environmental impact statement" required under the National Environmental Policy Act. *Alexander*, 469 U.S. at 298-299, 307-308 n.32. No such "NEPA statement" requirement is sought in this case.

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[13] Petitioners support their claim that the Third Circuit's decision presents a threat to federalism with a "suggest[ion]" in an amicus brief filed by the United States in the district court that the regulation may require state officials to consider the special needs of urban school districts. Ex. Pet. 26. However, as the Third Circuit correctly observed, this case does not involve an attempt to obtain additional funding based on factors "external to the state subsidy program." App. 14a. Rather, this case involves a straightforward claim of racial discrimination inherent in the funding formula itself. *Id.*

IV. THE LEGISLATIVE PETITIONERS' CONTENTION THAT THE INJURY CLAIMED IS NOT REDRESSABLE MISCONSTRUES THE INJURY AND SHOULD NOT BE HEARD.

The Legislative Petitioners claim that Respondents' injury is not redressable because, if Pennsylvania were ordered to provide more money to the School District, local or federal sources might decide to decrease their contributions, thus leaving Respondents in the same position. Leg. Pet. 25-26. This argument misconstrues Respondents' injury. As the Third Circuit recognized, the injury alleged is not lack of adequate funding; rather, it is "that non-white school children in Pennsylvania receive less favorable treatment than their white counterparts because the state funds the school districts most of them attend at a lower level than it does the school districts most white school children attend." App. 28a. The injury is redressable because it will be remedied when Petitioners comply with the Title VI regulations and end differential treatment based on race. *Id.* *ASARCO Inc. v. Kadish*, 490 U.S. 605 (1989), the case Legislative Petitioners cite to support their argument, Leg. Pet. 26-28, is inapposite because it presented a claim of taxpayer standing, not an allegation of discrimination by the named defendants.

In circumstances more similar to this case, this Court has refused to speculate about hypothetical future events that could affect the interests of the parties. *See, e.g., Federal Election Comm'n v. Akins*, 524 U.S. 11, 118 S. Ct. 1777, 1786-87 (1998) (injury was redressable although Federal Election Commission might later reach same result, noting "we cannot know that the FEC would have exercised its prosecutorial discretion in this way"); *United States v. Nixon*, 418 U.S. 683, 695-697 (1974) (claim was justiciable and Special Prosecutor had standing even though the President could fire the prosecutor). Indeed, in this case, the Complaint alleges and the Legislative Petitioners agree that the overall system

of public education, including the scope of local funding, is the State's system. App. 215a, ¶ 47; Leg. Pet. 2. That proposition must be accepted at this stage of the case; if Petitioners wish to contest it, the district court is the proper place to do so.

In any event, the Legislative Petitioners' redressability theory proves far too much, for under it any recipient of federal funds could engage in intentionally, blatantly racist behavior by providing a diminished program to minorities on the basis of race so long as the program has other funding streams that arguably could be cut to keep the program diminished. Redressability, when properly applied, is a shield to prevent court intervention where there is no case or controversy. Petitioners, however, would have it become a barrier to enforcement of a binding federal regulation as long as they can speculate about every conceivable decision of other actors which could eventually affect total funding under the state's system.

CONCLUSION

For all of the foregoing reasons, both Petitions for a writ of certiorari should be denied.

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